71-1591

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

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No.

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WASHINGTON URBAN LEAGUE, INC., ET AL., *Petitioner*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL., *Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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## PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Petitioner prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above-entitled cause on February 16, 1972, and that court's denial of petitioner's petition for rehearing entered on March 9, 1972.

### OPINIONS BELOW

The order of which review is sought, Order No. 5477 of the Public Service Commission of the District of Columbia, has not been published but has been reprinted in Appendix A, *infra*.

The order of the District of Columbia Court of Appeals denying the petitioner's application for a stay of the Commission's proceedings pending review, and dismissing the petitioner's petition of appeal from Order No. 5477 is not reported, but has been reprinted in Appendix B, *infra.*

The order of the District of Columbia Court of Appeals denying petitioner's petition for rehearing and motion for certification of record is not reported, but has been reprinted in Appendix C, *infra.*

The order of the District of Columbia Court of Appeals denying the petitioner's motion for stay and temporary injunction pending the filing of an application for writ of certiorari in the Supreme Court is not reported, but has been reprinted in Appendix D, *infra.*

## JURISDICTION

The order of the District of Columbia Court of Appeals dismissing the petition of appeal was entered on February 16, 1972. The order of the District of Columbia Court of Appeals denying the petition for rehearing and motion for certification of record was entered on March 9, 1972. The jurisdiction of the Supreme Court to review this case by writ of certiorari rests on 28 U.S.C. section 1257(3).

## QUESTIONS PRESENTED

1. Whether a regulatory agency having statutory authority to enforce national and local laws on fair employment practices, and having reason to believe that a public utility company subject to its authority may not be in compliance with those laws, may confer the benefits of a rate increase on that utility without acting to assure that the proceeds of the rate increase

will not be used to deprive citizens of their constitutional and statutory rights with respect to employment.

2. Whether it is a denial of the equal protection of the laws and of the due process of law for a governmental agency, charged with the duty of protecting the public interest, to compel citizens within its jurisdiction to subsidize the operations of a public utility company subject to its authority when it has reason to believe that that utility may be engaged in activities which deprive those citizens of their constitutional and statutory rights with respect to employment.

3. Whether a party to proceedings before a regulatory agency is denied the due process of law and the equal protection of the laws when that agency prohibits the party from being heard with respect to an issue inherent in those proceedings.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### 1. Constitutional Provisions

This case involves the due process clause of the Fifth Amendment to the Constitution of the United States, which provides that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . Constitution of the United States, U.S.Const., amend. V.

This case also involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States to the extent that the requirements of that amendment are embodied in the due process clause. The equal protection clause provides that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws. U.S.Const. amend. XIV, § 1.

**2. Statutory Provisions**

This case also involves provisions of the Civil Rights Act of 1964, 42 U.S.C. section 2000 – e. That section states that it shall be an unlawful employment practice for an employer:

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Another section of the Civil Rights Act which is also involved, 42 U.S.C. section 2000 – d, provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Provisions of local law involved in the case are the following:

> 43 D.C. Code sections 303, 406, 408, 412, 601, 704, 705 and 1002 are reprinted in Appendix E, *infra*. Article 47 § 4, D.C. Police Regulations is reprinted in Appendix F, *infra*.

## STATEMENT OF THE CASE

### Introduction

Since February 27, 1969, when the Potomac Electric Power Company (PEPCO) applied for an earlier rate increase, the petitioner has been attempting to aid the respondent Public Service Commission in fulfilling its statutory and constitutional duty to assure that the benefits and privileges conferred on that utility by the Commission will be used in a lawful manner. The petitioner's efforts, however, have been to no avail, for one rate increase has been granted and another request is being processed, all without any effectual steps being taken to prevent the proceeds of the rate increases from being used unlawfully.

After the filing of PEPCO's 1969 application for a rate increase, the Urban League intervened in the proceedings, alleging that PEPCO engaged in racial discrimination and that the Public Service Commission had a duty to remedy such discrimination before granting any rate increase. The Urban League was allowed to present evidence of racial discrimination at the Commission's hearings on the application. Based on the testimony and documentary evidence presented, the Commission granted a rate increase to PEPCO, but also, in the same order, directed PEPCO to initiate an affirmative action program designed to provide equal employment opportunity to Black citizens. PEPCO appealed that portion of the order requiring it to afford equal opportunity to Blacks and succeeded in having *that portion* of the order vacated by United States District Judge Pratt on February 23, 1971. That portion of the order was vacated by Judge Pratt because PEPCO had not been notified that its employment practices would be an issue in the proceedings on

its rate increase application. In vacating the affirmative action order, Judge Pratt nevertheless held that:

> Because PEPCO is a private utility, pursuing an essentially governmental function, guaranteed a stated rate of return on its investment, and regulated in the public interest, . . . the Commission had the authority and power to examine Pepco's employment practices, either as a part of a rate proceeding or as an independent matter. *Potomac Electric Power Company* v. *Public Service Commission of the District of Columbia,* Civil Action Nos. 2382 – 70, 2384 – 70 (D.D.C. 1970).

A copy of Judge Pratt's unreported order is reprinted in Appendix G, *infra.*

Despite the holding that it had the authority to investigate PEPCO's employment practices, the Commission permitted the previous rate increase to remain in effect without further processing the Urban League's complaint of racial discrimination and without taking any steps to assure that the increase would not be used to perpetuate the discriminatory employment practices which it originally deemed necessary to correct.

**Proceedings Below**

The Public Service Commission, by its actions and refusals to act, has continued to condone PEPCO's employment practices right through the present rate proceedings, even though it has had and still has actual notice of the unlawfulness of those practices. Indeed, the respondent has gone out of its way to shield PEPCO from scrutiny of its employment practices in this rate proceeding.

On July 12, 1971 PEPCO applied to the respondent for an additional increase in its rates for retail electric

service. This application was docketed by the Commission as Formal Case No. 568.

On September 3, 1971 the Washington Urban League petitioned the Commission for leave to intervene in Formal Case No. 568 on behalf of minority and low-income consumers of electricity. On September 23, 1971 the Commission held a prehearing conference for the purpose of identifying the participants in the rate hearing and defining the issues which would be considered. During this conference the Urban League was granted intervention and proposed that the Commission consider PEPCO's discriminatory employment practices in light of the due process of law and equal protection of the law requirements of the Constitution of the United States in deciding whether and under what conditions PEPCO should be granted a rate increase. The Commission requested that the Urban League submit a brief in support of the Commission's authority to consider what it referred to as the "abstract" question of employment practices in a rate hearing. The Urban League complied with this request.

On October 6, 1971 the Office of Human Rights of the District of Columbia Human Relations Commission, the District of Columbia Agency with primary responsibility for enforcing fair employment laws, submitted a memorandum to the respondent in support of the respondent's concurrent authority and responsibility to investigate alleged discriminatory employment practices and to condition any rate increase upon full compliance with fair employment laws. In that memorandum the Office of Human Rights suggested that the respondent appoint the Director of the Office of Human Rights as its investigating agent to gather evidence of PEPCO's employment practices, pursuant to 43 D.C. Code, section 406, Appendix E, *infra*.

On October 12, 1971 the Commission issued Order No. 5477, declining to accept the offer of the Office of Human Rights to serve as investigating agent and refusing to make the matter of PEPCO's employment discrimination an issue in the case unless it could be shown that such discrimination was unprofitable. This order also outlined the issues which would be considered in the rate proceeding, and established dates for the taking of testimony.

On November 1, 1971 the first day of the Commission's hearings on PEPCO's application, the Urban League filed with the Commission an application for reconsideration of Order No. 5477 pointing out that in its restriction of consideration of the issue of discrimination the Commission was shirking its constitutional and statutory duties. This application was filed in compliance with the provisions of Title 43, section 704 of the District of Columbia Code. Section 704 provides that filing of an application for reconsideration shall act as a stay of the execution of the Commission's order. Section 704 contains a proviso that the filing of an application for reconsideration shall not stay an order of the Commission if the utility files a written consent to that effect. No such written consent was filed by PEPCO. Despite this fact, the Commission held a full day of hearings on PEPCO's application on November 2, 1971 without considering the Urban League's application for reconsideration. At the close of PEPCO's testimony on the afternoon of November 2, the Commission heard oral argument from counsel for the Urban League on the issues raised by its application for reconsideration.

On November 3, 1971 the Commission denied the Urban League's application on its merits, but stated

that at such time as it was presented with evidence of employment discrimination it would determine what action might be required.

On December 6, 1971, pursuant to an extension of time granted by the Commission on December 3, 1971, the Urban League submitted proposed written testimony of employment discrimination practiced by PEPCO. At the same time the Urban League submitted applications for subpoenas for the production of documents in the possession of PEPCO and of the Equal Employment Opportunity Commission, and a motion to take the deposition of PEPCO's president upon written interrogatories. Each of these requests for discovery was related to the question of PEPCO's employment discrimination.

On December 13, 1971 the Commission denied the Urban League's applications for subpoenas and its motion for the taking of interrogatories on the grounds, *inter alia*, that they were not related to the issues in the case.

On December 14, 1971 the Urban League offered the written testimony of employment discrimination which it had previously submitted to the Commission as evidence in the Commission's proceedings. On that date the Commission refused to admit this testimony into evidence on the ground that the testimony was not related to the issues in the case as specified in Order No. 5477.

On December 30, 1971 pursuant to Title 43, section 705 of the District of Columbia Code, the Urban League filed a petition of appeal from Order No. 5477 in the District of Columbia Court of Appeals, and served a notice of said appeal on the Commission and

on all parties to the Commission's proceedings. In this petition, the Urban League alleged that (1) PEPCO was violating its duties under 43 D.C. Code § 303 to "comply . . . with all laws of the United States applicable" by violating Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000 – e *et seq.*) and the Fifth and Fourteenth Amendments to the United States Constitution by engaging in racial discrimination in employment and that (2) the respondent was violating its duties to regulate PEPCO under 43 D. C. Code sections 303, 408, 601 and was thereby violating its constitutional responsibility under the Fifth and Fourteenth Amendments to assure that it did not condone, sanction or perpetuate racial discrimination. The petitioner requested the court below to direct the respondent to include the issue of employment discrimination as an issue in the rate hearing and asked the court to enjoin further proceedings before the respondent until it was granted leave to be heard with respect to that issue.

On January 6, 1972 the Urban League filed with the Commission an application for a stay of the proceedings in Formal Case No. 568 pending review of the petition of appeal. On January 10, 1972 the Commission denied this application. Subsequently motions to dismiss the appeal were filed by the respondent, and by intervenors Potomac Electric Power Company and Electric Utility Employees' Union.

On January 21, 1972 the Urban League filed with the District of Columbia Court of Appeals a motion for a stay of Order No. 5477 pending a review of the petition of appeal.

On January 31, 1972 the Center City Community Corporation and the Friendship House Association,

Inc. filed notices of intention to intervene in support of the Urban League's petition of appeal and in support of its motion for stay pending review.

On February 16, 1972 the District of Columbia Court of Appeals, without stating its reasons, denied the Urban League's motion for stay pending review, simultaneously granted the motions to dismiss of the Public Service Commission, Potomac Electric Power Company, and Electric Utility Employees' Union, and dismissed the appeal with no record of the Commission's proceedings before it and without holding a hearing on the issues raised by the appeal.

On February 29, 1972 the Urban League timely filed with the District of Columbia Court of Appeals a petition for rehearing and motion for certification of record, again pointing out that the Commission had failed to comply with its statutory obligation to certify the record of its proceedings to the court.

On March 9, 1972 the District of Columbia Court of Appeals denied the Urban League's petition for rehearing and motion for certification of record, again without stating the reasons for its action.

On March 13, 1972 the Urban League filed with the District of Columbia Court of Appeals a motion for stay of proceedings before the Commission in its Formal Case No. 568 pending the timely filing of a petition for writ of certiorari with the Supreme Court of the United States. The Court denied this motion on March 16, 1972, again without stating the reasons for its action.

On April 20, 1972 the respondent, acknowledging that substantial questions had been raised as to the lawfulness of PEPCO's employment practices, and

acknowledging its responsibilities to correct those practices, issued Order No. 5508. This order announced that an investigation of PEPCO's employment practices, listed by the respondent as Formal Case No. 576, would be instituted. However, in more than a month since this proceeding was announced, the respondent has taken no steps to set dates for the taking of testimony in that investigation or to implement the investigation in any manner. Moreover, the respondent has failed to take any measures to assure that the unlawful practices which prompted the issuance of Order No. 5508 will not be perpetuated by any increase in rates conferred on PEPCO. The Urban League requested leave to intervene in Formal Case No. 576 on April 25, 1972, at the same time pointing out the respondent's responsibility to consider PEPCO's employment practices in the rate proceeding. No action has been taken on this request for intervention.

On May 9, 1972 the Commission issued Order No. 5509, Proposed Findings, Opinion and Order. In this Order the Commission proposed to authorize PEPCO to increase its District of Columbia gross operating revenues by $12,152,000 and to require it periodically to file data on jurisdictional allocations and expenditures for environmental research and development. The proposed order contains no provisions to assure that the proposed authorized increase in operating revenues will not be used to deprive citizens of their constitutional and statutory rights not to be discriminated against. The Commission provides for the filing of exceptions to the proposed order by June 2, 1972, and requires parties filing exceptions to the proposed order to designate those portions of the record of the Commission's proceedings which they wish the Commission to consider in ruling on the exceptions.

## REASONS FOR GRANTING THE WRIT

The petitioner feels that this case is appropriate for review by the Supreme Court on writ of certiorari because the District of Columbia Court of Appeals has decided a substantial federal and constitutional question in a way not in accord with applicable decisions of this Court; see *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954); *Public Utilities Commission* v. *Pollack,* 343 U.S. 451 (1952); *Shelley* v. *Kraemer,* 334 U.S.1 (1948); *Marsh* v. *State of Alabama,* 326 U.S. 501 (1946); *Coit* v. *Green,* 40 U.S.L.W. 3286 (S. Ct. 1971) affirming *Green* v. *Connally,* Civil Action No. 1355 – 69 (D.D.C. June 30, 1971); has rendered a decision in conflict with the decision of a federal district court involving the identical subject matter and the same parties; see *Potomac Electric Power Company* v. *Public Service Commission of the District of Columbia,* Civil Action Nos. 2382–70, 2384–70 (D.D.C. Feb. 23, 1971); has rendered a decision in conflict with the decision of a three judge federal district court in the same jurisdiction on a matter involving the same principle of constitutional law; see *McGlotten* v. *Connally,* Civil Action No. 3377–70 (D.D.C. Jan. 11, 1972); and has so far departed from, and sanctioned the departure from, the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

### I. DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS ESTABLISH THAT THE RESPONDENT HAS THE POWER AND THEREFORE THE DUTY TO REGULATE PEPCO's EMPLOYMENT PRACTICES

#### (A.) The Respondent's Power

The petitioner contends that the respondent's actions and refusals to act are the equivalent of government participation in private acts which deny to United

States citizens the equal protection of the laws and the due process of law. Thus the respondent's actions are in contravention of the principles laid down by this Court in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954); *Public Utilities Commission* v. *Pollack,* 343 U.S. 451 (1952); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Marsh* v. *State of Alabama,* 326 U.S. 501 (1946); *Coit* v. *Green,* 40 U.S.L.W. 3286 (S. Ct. 1971) affirming *Green* v. *Connally,* Civil Action No. 1355 - 69 (D.D.C. June 30, 1971).

The United States District Court for the District of Columbia has specifically held that the respondent has the power and authority to eliminate PEPCO's racially discriminatory employment practices in rate proceedings. See Appendix G. The following provisions of the District of Columbia Code make this authority clear:

43 D.C. Code section 303 provides that:

> The Commission shall the power . . . to *require and compel* every public utility to comply . . . with all laws of the United States applicable, and any municipal ordinance or regulation relating to said public utility, and to conform to the duties upon it thereby imposed . . . (Emphasis added)

43 D.C. Code section 601 provides in relevant part:

> The commission shall, within its jurisdiction - Have *general supervision* of all gas corporations and electrical corporations . . . having authority . . . to lay down, erect, or maintain wires, pipes, conduits, ducts, or other fixtures . . .
>
> . . . examine or investigate the methods employed . . . in manufacturing, distributing, and supplying gas or electricity . . . and have power to order such

> reasonable improvements as will reasonably promote the public interest, preserve the public health, and protect those using such gas or electricity and those employed in the manufacture and distribution thereof . . . (Emphasis added)

43 D.C. Code section 1002 provides:

> The Commission *shall inquire* into any neglect or violation of the laws or regulations in force in the District of Columbia by any public utility doing business therein . . . and shall have the power, and it *shall be its duty* to enforce the provisions of . . . all other laws relating to public utilities. (Emphasis added)

The provisions of 43 D.C. Code section 408, Appendix E, *infra*, authorize the respondent to investigate the practices of a utility such as PEPCO in a rate proceeding,

> Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates . . . charges . . . or services . . . are in *any* respect unreasonably or unjustly discriminatory, or that *any . . . act whatsoever affecting or relating* to . . . the production, transmission . . . or furnishing of heat, light . . . or power, or any service in connection therewith . . . is in any respect unreasonable . . . or unjustly discriminatory . . . (Emphasis added)

Section 408 requires that a formal hearing be held if the respondent issues an order pursuant to that section affecting rates, tolls, or charges.

The provisions of the Civil Rights Act of 1964, 42 U.S.C. section 2000 (e), 2000 (d), *supra*, page  are "applicable to" and "relating to" the employment practices of PEPCO within the meaning of 43 D.C.

Code sections 303, 601, 1002. The same is true of Article 47 of the District of Columbia Police Regulations, Appendix F, *infra*. Acts of employment discrimination by a quasi-governmental utility such as PEPCO, in violation of the provisions of the Civil Rights Act and local police regulations are patently unreasonable and unjustly discriminatory. Moreover, such acts affect the production, transmission, and service for which PEPCO's rates are charged. Thus by virtue of 43 D.C. Code section 408 the respondent has the power to prevent the rates charged by PEPCO from being used to perpetuate discriminatory activity. By virtue of 43 D.C. Code section 1002, it becomes the respondent's duty to do so.

**(B.) The Respondent's Duty**

Petitioner contends that settled principles of constitutional law require the respondent to exercise its power. Otherwise it becomes, itself, an instrument of racial discrimination. *Potts* v. *Flax,* 313 F.2d 284 (5th Cir. 1963); *Jenkins* v. *United Gas Corp.,* 409 F.2d 28 (5th Cir. 1968); *Rosen* v. *Public Service Electric & Gas Co.,* 409 F.2d 775 (3rd Cir. 1969); *Irvis* v. *Scott,* 318 F. Supp. 1246 (M.D.Pa. 1970), prob. juris. post. until merits, 401 U.S. 992 (1971); *Green* v. *Kennedy,* 309 F. Supp. 1127 (D.D.C. 1970); *Green* v. *Connally,* Civil Action No. 1355–69 (D.D.C. June 30, 1971), affirmed *sub nom. Coit* v. *Green,* 40 U.S.L.W. 3286 (S. Ct. 1971); *McGlotten* v. *Connally,* Civil Action No. 3377–70 (D.D.C. January 11, 1972).

As this Court said in *Burton* v. *Wilmington Parking Authority,* supra, at 725:

> . . . no state may effectively abdicate its responsibilities by either ignoring them or merely failing to discharge them.

And in *Robinson* v. *Florida,* 378 U.S. 153 (1964) this Court noted that state action of the kind prohibited in *Burton, supra,* could be accomplished by administrative and regulatory agencies. Indeed, it has been held that the failure to enforce laws against racial discrimination by a body having that power is in itself a denial of the equal protection of the laws to the Black community, since it denies that community the protection of laws enacted for its benefit. *Ethridge* v. *Rhodes,* 268 F. Supp. 83 (S.D. Ohio 1967). The above considerations were in essence, the reason for the holding in Judge Pratt's Order, Appendix G, *infra,* that the respondent had the authority to examine PEPCO's employment practices in a rate proceeding. Yet the respondent has chosen to disregard Judge Pratt's holding and to refuse to carry out its duty.

In refusing to carry out its duty, the respondent has by the terms of Judge Pratt's order, *infra,* Appendix G, effectively disabled itself from acting in this proceeding to assure that the proceeds of any rate increase granted will not be used to perpetuate employment discrimination. By this refusal the respondent,

> has so far insinuated itself into a position of interdependence [with PEPCO] . . . that it must be recognized as a joint participant in the challenged activity. *Burton* v. *Wilmington Parking Authority, supra,* at 725.

In *Bolling* v. *Sharpe, supra,* this Court held that discrimination by the District of Columbia government was a violation of Fourteenth Amendment equal protection requirements as embodied in the due process clause of the Fifth Amendment to the Constitution of the United States, applicable to the District of Columbia. By reason of its actions and refusals to act, "the Government has become sufficiently entwined with pri-

vate parties to call forth a duty to ensure compliance with the Fifth Amendment by the parties through whom it chooses to act." *McGlotten* v. *Connally,* Civil Action No. 3377-70, page 12 (D.D.C. January 11, 1972).

Even in the absence of specific statutory authority to examine employment practices in a rate proceeding, the constitutional requirements of equal protection embodied in the due process clause of the Fifth Amendment require the respondent to deny the benefit of a rate increase to a utility when the proceeds of that increase will be used to subsidize and perpetuate activities which deprive citizens of their constitutional and statutory rights. *Burton* v. *Wilmington Parking Authority, supra; Bolling* v. *Sharpe, supra.* This is so because the granting of any benefit, privilege, license or gratuity by a governmental agency to any entity which engages in racial discrimination constitutes an official sanction and support of such discrimination and is contrary to the public interest. As the court stated in *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F.2d 608, 620 (2d Cir. 1965), "the right of the public must receive active and affirmative protection at the hands of the Commission." This is especially true in the regulation of a monopolistic industry from which the public cannot turn in search of alternate service.

In light of the foregoing considerations the respondent's refusal to examine PEPCO's discriminatory employment practices in the rate proceeding unless it is shown that such practices are unprofitable can be viewed at best as in callous disregard of the constitutional and statutory rights of District of Columbia residents. For, as this Court has noted,

> Neither can it be ignored . . . that profits earned by discrimination not only contribute to, but are

indispensable elements in, the financial success of a governmental agency. *Burton* v. *Wilmington Parking Authority, supra,* at 724.

**(C.) There Is No Administrative Discretion To Deny Due Process And Equal Protection of the Law.**

Nor can the respondent's actions be justified under some pretext of administrative discretion or administrative convenience. The respondent's lawful scope of action is removed from the realm of discretion by 43 D.C. Code section 1002, Appendix E, and by the requirements of due process and equal protection discussed above. The principle of administrative convenience will not justify the respondent's actions because that is not, absent a compelling governmental interest, adequate support for infringement of a constitutional right. *Harrell* v. *Tobriner,* 279 F. Supp. 22, 29 (D.D.C. 1967) affirmed sub. nom. *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969).

There is here no legitimate governmental interest, compelling or otherwise, which can justify the respondent's conduct. This is made clear by the respondent's rejection of the offer of the District of Columbia Office of Human Rights to act as its investigating agent for the purpose of examining PEPCO's employment practices. Had the respondent accepted this offer, which it could have done under 43 D.C. Code section 406 the investigation of PEPCO's employment practices could have proceeded with no strain at all on the respondent's resources. For, under 43, D.C. Code section 412, the costs of any such investigation are to be borne "by the utility investigated." Thus, the respondent's failure either to investigate the lawfulness of PEPCO's employment practices itself in this rate proceeding or to appoint the Director of the Office of Human Rights

as its investigating agent can only be viewed as an active effort by the respondent to shield PEPCO from scrutiny of its employment practices in the proceedings below.

**II. THE FAILURE OF THE RESPONDENT TO REGULATE PEPCO's EMPLOYMENT PRACTICES AS A PRECONDITION TO GRANTING A RATE INCREASE CONFLICTS WITH DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS.**

The case law discussed above makes it abundantly clear that the action of the respondent in granting the benefit of a rate hearing to PEPCO but failing to assure that PEPCO does not continue to engage in racial discrimination makes the respondent itself a party to that discrimination. See *Potts* v. *Flax, supra.* This being so, it necessarily follows that in order to act consistently with the constitution, the respondent must conduct procedures designed to assure a hearing on the issue of PEPCO's employment practices prior to the conferring of any rate increase on that utility. We do not contend that this procedure must necessarily take place directly as part of the consideration of the economic issues involved in a rate hearing. But we do maintain that the procedures followed must assure that the Public Service Commission considers all allegations of racial discrimination prior to the granting of a rate increase and conditions any such increase on the remedying of any discriminatory practices it finds.

The constitutional infirmity of the respondent's conduct is not remedied by its Order No. 5508 announcing a separate investigation of PEPCO's employment practices for some indefinite time in the future. This is so for three reasons. First, Order No. 5508 does nothing to correct PEPCO's employment discrimination, nor does it, of itself, constitute an investigation of

PEPCO's employment practices. Order No. 5508 merely puts PEPCO on notice that at some indeterminate future date its employment practices will be investigated. As of this date, more than one month from the issuance of Order No. 5508, the respondent has done nothing to initiate or implement the investigation.

Second, even if the respondent's investigation had begun, the respondent has disabled itself from using the findings of such an investigation to prevent the proceeds of the proposed rate increase from being used to perpetuate discriminatory employment practices. The effect of Order No. 5477 is to assure PEPCO that even if it is a flagrant violator of fair employment laws it will remain eligible for a rate increase, and that any order granting an increase in rates in this proceeding will not be conditioned on PEPCO's cessation of unlawful employment practices.

Third, the questions raised below by the Urban League bear directly on the matter of whether the rates to be charged by PEPCO are "unreasonable or unjustly discriminatory." In determining whether the rates to be charged by a regulated industry are unjustly discriminatory, racial discrimination as such is certainly a matter to be considered by the Commission. See *Boynton* v. *Virginia,* 364 U.S. 454 (1960); *Georgia* v. *United States,* 201 F. Supp. 813, affirmed, 371 U.S. 9 (1962). This being the case, it is improper and manifestly inequitable for the respondent to sever the matter from its proper consideration in the rate proceedings below. *Mechling Barge Lines* v. *United States,* 376 U.S. 375, 383 (1964). Thus the respondent's prospective investigation in no way remedies the infirmity challenged by this petition.

The respondent's constitutional obligation to refrain from participation in discriminatory activity is in no way diminished in rate proceedings. As this Court pointed out in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944), "it is not theory, but the impact of the rate order which counts." The Court further observed that it is the "total effect" of the rate order which should be considered. Where the impact of the rate order, and by analogy, the rate proceeding here involved, is to encourage and perpetuate the practice of discrimination and the denial of the due process of law and the equal protection of the laws, it is unconstitutional.

Here the respondent's role in shielding PEPCO, in the proceedings below, from investigation of employment practices which the respondent acknowledges may be unlawful can only encourage PEPCO in the continuation of those practices. The respondent's proposal to grant PEPCO a rate increase without acting to prevent the proceeds of that increase from being used for discriminatory purposes can only perpetuate employment discrimination practiced by PEPCO.

It has been stated that a regulatory commission is not permitted "to act as an umpire blandly calling balls and strikes for adversaries appearing before it." *Scenic Hudson Preservation Conference* v. *Federal Power Commission, supra,* page 18, at 620. Here the respondent has been acting as an umpire calling balls in favor of PEPCO while refusing to call strikes. It has considered only those factors which would protect PEPCO while refusing to consider factors which protect the public interest and the rights of the petitioner. It is difficult to imagine a more striking example of the denial of the equal protection of the laws and of

the due process of law. As Mr. Justice Brennan has stated,

> something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. *Adickes* v. *Kress & Co.,* 398 U.S. 144, 190-91 (1970) [Brennan, J. concurring in part and dissenting in part].

**III. RESPONDENT'S REFUSAL TO ALLOW PETITIONER TO BE HEARD IN THE RATE PROCEEDING DENIES TO PETITIONER THE DUE PROCESS OF LAW.**

Inasmuch as the respondent has the duty to consider the lawfulness of a utility's employment practices in a rate proceeding when it has reason to believe that those practices are in violation of constitutional and statutory requirements, the lawfulness of those practices is an inherent issue in such proceedings. This being the case, the petitioner has the right to be heard with respect to this issue and to present to the respondent such matters as may aid it in the performance of its constitutional and statutory duties. The denial of this right is an immediate and continuing denial of the due process of law and of the equal protection of the laws to the petitioner. That the petitioner has the right to be heard in the proceedings before the respondent is clear from the following passage in *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 425 F.2d 543, 546, 547 (D.C. Cir. 1969). There it was stated:

> a "Public Intervenor" . . . is . . . more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts . . .
>
> This was all the more true here because prior to the efforts of the actively participating inter-

> venors, the Commission itself had long since found the licensee wanting . . . the Commission's duties did not end by allowing the Appellants to intervene; its duties began at that stage.

Moreover it was held in *L. B. Wilson, Inc.* v. *Federal Communications Commission,* 170 F.2d 793, 802 (D.C. Cir. 1948), that "An essential element of due process is an opportunity to be heard before the reaching of a judgment." The hearing required by due process must be such as to afford each party "substantial enjoyment of his constitutional rights." *Gordon* v. *Bowles,* 153 F.2d 614 (Em. App. 1946).

The respondent, by its Order No. 5477, and its conduct of the proceedings below pursuant thereto, has caused the petitioner to suffer a substantial deprivation of its rights to the due process of law and the equal protection of the laws. As the court stated in *L. B. Wilson, Inc.* v. *Federal Communications Commission, supra,* at 807 "He who decides anything, one party being unheard, though he should decide right, does wrong."

The respondent contended below that the order appealed from in this case is not a final order because it does not, under the definition given in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.,* 333 U.S. 103, 113, "impose an obligation, deny a right or fix some legal relationship as a consumation of the administrative process." The petitioner contends that the order appealed from does meet the requirement of finality as set forth in *Chicago, supra.* Specifically, the petitioner states that the order appealed from denies it the right to be heard in the proceedings before respondent with respect to an issue inherent in those

proceedings and denies to it the due process and equal protection of the laws. This deprivation is immediate, continuing, and will in no way be altered by any subsequent order of the respondent. The United States Court of Appeals for the District of Columbia Circuit recently held in *Goodman* v. *Public Service Commission of the District of Columbia,* No. 24,944, page 4 (April 18, 1972) that when an order of the respondent is thus "in no way left for further decision," the order is final with respect to the party affected thereby.

The character of finality to be attributed to orders of administrative agencies, does not depend on the chronological order in which they are issued nor upon their characterization by the agency. As the court stated in *Isbrandtsen Co.* v. *United States,* 211 F.2d, 51, 55 (D.C. Cir. 1954):

> Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action.

The test of finality, then, is not the stage of the proceedings at which the order is issued, but rather the effect of the order on the party aggrieved thereby. If that effect is final, the order may be appealed. See *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 545 (1949); *Goodman* v. *Public Service Commission of the District of Columbia, supra.* See also *Gillespie* v. *U.S. Steel Corp.,* 379 U.S. 148 (1964); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 685 (1949); *Land* v. *Dollar,* 330 U.S. 731, 734 (1947); *United States* v. *Mayton,* 335 F.2d 153 (5th Cir. 1964). Here the effect on the petitioner of the order appealed

from is final rather than tentative or incomplete. Petitioner is denied the right to participate in the proceedings before the respondent with respect to an issue inherent therein and respondent's processes are being used unlawfully. Petitioner is thus denied the substantive due process of law required of respondent by the Fifth Amendment of the Constitution. See *Potts* v. *Flax, supra,* page 16.

It should be emphasized at this point that the petitioner is not merely challenging the propriety of evidentiary rulings by the respondent. The constitutional infirmity challenged by this petition is the denial, in Order No. 5477, of the Urban League's right to be heard concerning matters which the respondent has an affirmative duty to consider. The respondent's evidentiary rulings are simply manifestations of its involvement in encouraging the practice of employment discrimination.

The respondent's insensitivity to the need to avoid such involvement has been evident throughout the proceedings below. So great and so persistent has been the respondent's involvement in this respect that it imbues the entire proceedings below with the taint of invalidity. This taint will not be removed until the Urban League's right to be heard is granted.

### IV. THE FAILURE OF THE COURT BELOW TO CONSIDER THE ISSUES RAISED IN THIS PETITION MAKES THIS AN APPROPRIATE CASE FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

When "state action" of the type herein complained of is alleged, careful scrutiny is called for "to assure that the State lives up to its own promise." *McGlotten* v. *Connally, supra,* page 18, at 9. Here, instead of receiving careful scrutiny, the respondent's conduct

has received virtually no scrutiny at all below. The respondent failed to stay its proceedings pending consideration of the Urban League's application for reconsideration, contrary to the requirements of 43 D.C. Code section 704. When the Urban League filed its petition of appeal in the court below, the respondent refused to certify the record of its proceedings to the court, contrary to the requirements of 43 D.C. Code section 705. The court below sanctioned these departures from statutorily prescribed procedures by dismissing the petitioner's appeal without a hearing, with no record before it, and without the statement of reasons for its dismissal required by 43 D.C. Code section 705. The Court below further sanctioned these departures from statutorily prescribed procedures by denying the Urban League's petition for rehearing and motion for certification of record, again without stating the reasons for its dismissal as required by 43 D.C. Code section 705.

Because of the actions described above, the petitioner has effectively been denied the right to judicial review of its claim of substantial deprivation of its constitutional rights. Unless this Court considers the matters raised by this petition, the Urban League's rights asserted herein will remain unvindicated.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the writ of certiorari herein sought, enjoin further proceedings before the respondent below until such time as the petitioner is granted the right to be heard with respect to the issue of employment discrimination in and of itself, and direct that any further proceedings before the respondent be

conducted consistently with the principles laid down by this Court in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

Respectfully submitted,

TIMOTHY L. JENKINS
LESLIE H. NELSON
2001 S Street, N.W., Suite 602
Washington, D.C. 20009
*Counsel for Petitioner*

# APPENDIX

# APPENDIX

## APPENDIX A

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1625 I Street, N.W., Washington, D.C. 20006

Order No. 5477

October 12, 1971

Formal Case No. 568

IN THE MATTER OF

Application of POTOMAC ELECTRIC POWER COMPANY for an increase in its rate of return and for an increase in rates for retail electric service.

### Order

The Commission has before it for consideration the record of the pre-hearing conference in this case, held pursuant to notice on September 23, 1971, together with briefs or legal memoranda submitted on behalf of intervenors Students Hot on Conserving Kilowatts and the Sierra Club (SHOCK-Sierra Club), Washington Urban League (Urban League) and Center City Community Corporation, and reply memoranda submitted by the Potomac Electric Power Company (Pepco) and intervenor Washington Gas Light Company, all directed to the relevance and materiality of certain issues proposed for inclusion in this proceeding.

The Commission has also received (and has served copies on all parties) a memorandum transmitted by letter dated October 6, 1971, from the Director, District of Columbia Office of Human Rights, essentially in support of the position of Urban League, but alternatively suggesting that the Director be appointed an agent of the Commission to conduct an investigation into Pepco's employment practices.

As set forth in the Commission's Rules, one of the principal purposes of a pre-hearing conference is "simplification and delimitation of the issues" (Rule 9.2(a)). To this

end the greater part of the pre-hearing conference was directed. The Commission has found the discussions on the record, as well as the briefs and memoranda submitted in response to its request, most helpful. It has given thorough consideration to all points presented.

The Commission will address first those issues proposed by intervenors which appear to be most significant, *i.e.*, environmental or ecological, employment practices and customer deposit policies and practices.

Although the Commission is of the view that these issues may or may not prove to be material and relevant to what it considers the ultimate issue in this case, *i.e.*, the justness, reasonableness, and non-discriminatory nature of retail electric rates in the District of Columbia, it is not disposed at this time to deny to the proponents of those issues an opportunity to present evidence on the basis of which relevance and materiality may be persuasively or convincingly demonstrated. That matters such as environmental pollution or discriminatory employment practices by utilities in the District of Columbia are proper subjects for investigation by the Commission seems clear.[1] It is equally clear that the Commission has and must exercise its discretion, its expertise, and its judgment in conducting its proceedings to best serve the public interest. It is questionable, however, whether in the orderly and expeditious dispatch of a utility rate proceeding the Commission should properly involve itself and the parties to the proceeding, including a utility and its ratepayers in the District of Columbia, in a full scale investigation of issues which may more properly be brought in an independent proceeding.

The Commission is not insensitive to the significance of the environmental and employment practices issues raised

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[1] Sec. 43-303, D.C. Code 1967; Judge Pratt's order in CA 2382-70 and 2384-70 filed in the United States District Court of the District of Columbia on February 23, 1971.

by intervenors. Both are matters of serious concern. The Commission must also be concerned, however, with the continued provision in the District of Columbia of adequate and reliable electric service at just, reasonable and non-discriminatory rates, and with balancing, as it were, the sometime conflicting interests of ratepayers and investors.

While the Commission cannot fully agree with Pepco's suggestion that here it must also weigh in the balance the constitutional rights of Pepco's employees to non-discriminatory employment practices and the constitutional right of Pepco's investors to the opportunity to earn a fair and reasonable return on their investment, it does not appear unreasonable, if these rights are indeed in conflict, for the Commission's inquiry to be directed to the production of evidence showing a logical, functional or causal relationship, if such exists, between facts underlying the two constitutional principles.

Intervenor Urban League urges the Commission to find, "as a precondition to holding the rate hearing," that rates may not be increased if Pepco's employment practices are found to violate the constitutional rights of its employees. Acceptance of this proposition, however, would require the Commission to first conduct a separate hearing on the sole issue of employment practices, thus deferring action on Pepco's rate increase application for such time as would be necessary to complete that hearing; and depending on the ultimate result, denying Pepco a hearing on its claim of constitutional right to have the opportunity to earn a fair and reasonable return.

The Commission is not convinced at this point of the legal validity of Urban League's position. While its memorandum cites many cases of governmental action in matters involving licensing and contracting, it omits reference to the one decided case[2] in which the question of rele-

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[2] Pepco has cited two other cases, both apparently unreported which it contends are contrary to Urban League's contentions.

vance of employment practices in a utility rate case was squarely in issue, and in which the decision was essentially in accord with the Commission's views here. In *American Telephone & Telegraph Co.*, 27 FCC 2nd 151, (1971) the Federal Communications Commission, noting that allegations of discrimination in employment did not establish a relationship to rates, put specifically in issue the question of that relationship.

There is, it would seem, a valid distinction between governmental licensing and contracting—each within the discretionary power of the government to withhold—and governmental action in a utility rate case, in which governmental discretion is circumscribel by the constitutional requirement that a utility must be allowed the opportunity to earn a fair return. Neither the Commission's action in affording Pepco a hearing on its rate increase application nor its action in finding, after hearing, an existing or proposed rate of return or rate schedules fair and reasonable can properly be said to be the conferring of a governmental "benefit." These "benefits", if such they are, were conferred on Pepco by the Constitution when it dedicated its property to public use.

For these reasons, the Commission deems it inappropropriate at this time to embark on separate hearings, independent of the pending rate case, in respect of employment practices.

The suggestion by the Director, Office of Human Rights, that he be appointed an agent of the Commission for the purpose of investigating Pepco's employment practices, while an appealing offer, will not be accepted at this time. The Commission is of the opinion that its approach to the subject of employment practices, as set forth above, will not only provide for more expeditious consideration and resolution of this matter in the context of this proceeding, but will also provide a factual basis not now available for determining what, if any, future action, including investigation by the Office of Human Rights, may be required.

Similar reasoning is also persuasive in the Commission's consideration of the environmental issues raised by SHOCK-Sierra Club, and the customer deposit issue raised by Center City Community Corporation. The ultimate disposition in this proceeding of evidence on these matters will be on the basis of its relevance and materiality to the issues as set forth in this Order.

With these considerations in mind, therefore, the Commission finds and specifies the following as issues in this case:

1. What is the proper District of Columbia rate base on which Pepco shall be given an opportunity to earn;

2. What revenues and expenses of Pepco are proper and properly allocable to the District of Columbia;

3. What is the proper test year to be used in evaluating Pepco operating results in the District of Columbia;

4. What is a fair and reasonable rate of return for Pepco;

5. Whether, and in what manner, Pepco's customer deposit policies affect Pepco's revenues, expenses, or service in the District of Columbia;

6. Whether, and in what manner, the environmental or ecological effects of Pepco's operations in the District of Columbia affect Pepco's revenues, expenses, or service in the District of Columbia;

7. Whether, and in what manner, Pepco's employment practices in the District of Columbia, if shown to be discriminatory, affect Pepco's revenues, expenses, or service in the District of Columbia.

As indicated above, this specification of issues does not identify the outer limits of the Commission's jurisdiction, nor is it intended to preclude Commission consideraton of

matters which during the course of the hearings in this case may appear to warrant, on proper notice, the addition of an issue or issues. Obviously, this enumeration of issues in this proceeding is without prejudice to the right of any party (or to the right or duty of the Commission itself on its own motion) to seek (or to institute) separate proceedings with respect to particular matters where that action may appear appropriate.

In this context, Urban League and Center City Community Corporation have urged, as the Commission understands their memoranda, that discriminatory customer treatment be made an issue in this case; and SHOCK-Sierra Club would place in issue Pepco's projected growth rate, the validity of marginal cost pricing, and Pepco's advertising and promotional practices. To the extent that these matters may be relevant and material to issues herein specified, *e.g.*, Pepco's revenues, expenses, rate base or rate of return, there appears to be no need at this time to formulate separate issues specifically identifying each item. Receipt in evidence of testimony on these subjects will, of course, be subject to the Commission's evidentiary rules and rulings (See Rule 12.7).

One further matter with respect to issues warrants comment here. As in the past, the Commission proposes to conduct this proceeding in two phases. Phase I will be concerned with the issues herein specified as they relate to overall operating results, revenue requirements and rate of return of Pepco in the District of Columbia. Phase II, which will immediately follow the issuance of the Commission's decision in Phase I, will be concerned with Pepco's retail rates and rate schedules in the District of Columbia. Testimony and evidence directed toward adoption of particular rates or rate schedules, or in support of allegations of discriminatory rates or rate treatment of individual customers or customers of a particular class will be heard only in Phase II.

There remain three additional subjects which must be considered and disposed of in this Order. First, as stated on the record of the pre-hearing conference, (Tr. 11), all petitioners for intervention there represented by counsel or officers will be granted intervention. The Commission has received no oppositions to any of the petitions for intervention timely received in its offices, and it is therefore disposed to grant and does hereby grant all such petitions. For the convenience of the parties as well as for purposes of record, the following petitioners are granted intervention in this proceeding:

Students Hot on Conserving Kilowatts (SHOCK) and Sierra Club

General Services Administration (On behalf of Federal executive agencies and the District of Columbia as customers)

Washington Urban League

Washington Gas Light Company

District of Columbia Citywide Consumer Council, Inc.

Center City Community Corporation

D.C. Federation of Civic Associations and Interfederation Council

Senior Citizens Committee, D.C. Federation of Civic Associations, Inc., and Senior Neighbors and Companion Clubs Advisory Council

Safeway Stores, Inc.

Friendship House Association

United Planning Organization

The Commission wishes to re-emphasize its desire and its request made at the pre-hearing conference (Tr. 11-12) that intervenors having common interests make all reasonable efforts to consolidate their resources and arrange for

participation in these proceedings through a single spokesman. It is not the Commission's intention to deprive any party of the right to be heard, but merely to avoid repetitive or cumulative testimony or examination of witnesses.

Second, with regard to the matter of transcripts for intervenors, the Commission is disposed to allow one free transcript of each day's hearing to each intervenor who specifically requests same in writing (Tr. 36). In order to assist the Commission in maintaining an orderly flow of business in this case all parties desiring future copies of transcripts shall request the same in writing to this Commission on or before the 29th day of October, 1971, and all such transcripts so requested shall be available to be picked up at the offices of this Commission, Suite 204, 1625 I Street, Northwest, Washington, D.C. 20006.

Finally, the Commission comes to the matter of scheduling procedural dates. The Commission is persuaded that, giving due consideration to the suggestions and comments of all parties, the schedule proposed at the pre-hearing conference is a reasonable one, and it is hereby adopted. Following that schedule, the Commission will proceed as follows:

November 1, 1971—Beginning of hearings for cross-examination of Pepco witnesses whose testimony and exhibits have been distributed.

December 3, 1971—Intervenors written testimony distributed to parties and the Commission.

December 13, 1971—Beginning of hearings for cross-examination of intervenor witnesses.

December 23, 1971—Commission Staff written testimony distributed to parties and Commission.

January 10, 1972—Beginning of hearings for cross-examination of Staff witnesses.

January 24, 1972—Pepco rebuttal testimony (if any) distributed to parties and Commission.

January 31, 1972—Beginning of hearings for cross-examination of Pepco rebuttal witnesses.

The Commission itself will make every effort to adhere to, or if possible expedite, this schedule; and it urges all parties to do the same. The Commission may, however, if its circumstances require or on motion for good cause shown, make such changes in this schedule as the interests of orderly procedure and justice may indicate to be necessary or appropriate.

By direction of the Commission:

/s/ DONALD E. CROTSLEY
Donald E. Crotsley
*Executive Secretary*

A TRUE COPY:

*Chief Clerk*

## APPENDIX B

DISTRICT OF COLUMBIA
COURT OF APPEALS

District of Columbia Court of Appeals Filed Feb. 16, 1972

No. 6233 January Term, 1972

Order No. 5477

WASHINGTON URBAN LEAGUE, INC., *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent.*

CENTER CITY COMMUNITY CORPORATION,
POTOMAC ELECTRIC POWER COMPANY,
ELECTRIC UTILITY EMPLOYEES' UNION,
FRIENDSHIP HOUSE ASSOCIATION, INC.,
*Intervenors.*

Before: FICKLING, KERN AND REILLY, *Associate Judges.*

**Order**

On consideration of respondent's and intervenors' motions to dismiss and of petitioner's response thereto; and on consideration of petitioner's motion for stay, it is

ORDERED that petitioner's aforesaid motion for stay be denied, and it is

FURTHER ORDERED that the motions to dismiss be granted and this case is hereby dismissed.

By the Court:

AUSTIN L. FICKLING,
*Associate Judge.*

Associate Judge Reilly did not participate in this order.

## APPENDIX C

DISTRICT OF COLUMBIA
COURT OF APPEALS

District of Columbia Court of Appeals Filed Mar. 9, 1972

No. 6233 January Term, 1972

WASHINGTON URBAN LEAGUE, INC., *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent.*

CENTER CITY COMMUNITY CORPORATION,
POTOMAC ELECTRIC POWER COMPANY,
ELECTRIC UTILITY EMPLOYEES' UNION,
FRIENDSHIP HOUSE ASSOCIATION, INC.,
*Intervenors.*

Before: FICKLING, KERN AND REILLY, *Associate Judges.*

**Order**

On consideration of petitioner's petition for rehearing and motion for certification of record, it is

ORDERED that petitioner's aforesaid petition and motion are denied.

By the Court:

AUSTIN L. FICKLING,
*Associate Judge.*

## APPENDIX D

DISTRICT OF COLUMBIA
COURT OF APPEALS

District of Columbia Court of Appeals Filed Mar. 16, 1972

No. 6233 January Term, 1972

WASHINGTON URBAN LEAGUE, INC., *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent.*

CENTER CITY COMMUNITY CORPORATION,
POTOMAC ELECTRIC POWER COMPANY,
ELECTRIC UTILITY EMPLOYEES' UNION,
FRIENDSHIP HOUSE ASSOCIATION, INC.,
*Intervenors.*

Before: FICKLING, KERN AND REILLY, *Associate Judges.*

**Order**

On consideration of petitioner's motion for stay and temporary injunction pending the filing of an application for writ of certiorari in the Supreme Court of the United States, it is

ORDERED that petitioner's aforesaid motion is denied.

By the Court:

AUSTIN L. FICKLING,
*Associate Judge.*

## APPENDIX E

§ 43-303. Commission to compel compliance with chapters 1-10 of this title, with laws, ordinances, and charter—Criminal liability continued.

The commission shall have power, after hearing and notice by order in writing, to require and compel every public utility to comply with the provisions of chapters 1-10 of this title, and with all other laws of the United States applicable, and any municipal ordinance or regulation relating to said public utility, and to conform to the duties upon it thereby imposed or by the provisions of its own charter, if any charter has or shall be granted it: *Provided,* That nothing herein contained shall be held to relieve any public utility, its officers, agents, or servants, from any punishment, fine, forfeiture, or penalty for violation of any such law, ordinance, regulation, or duty imposed by its charter, nor to limit, take away, or restrict the jurisdiction of any court or other authority which on March 4, 1913, had or which may thereafter have power to impose any such punishment, fine, forfeiture, or penalty. (Mar. 4, 1913, 37 Stat. 977, ch. 150, § 8, par. 4.)

* * * * * * * * * *

§ 43-406. Appointment of investigating agents—Powers.

For the purpose of making any investigation with regard to any public utility the commission shall have power to appoint, by an order in writing, an agent, whose duties shall be prescribed in such order. In the discharge of his duties such agent shall have every power whatsoever of an inquisitorial nature granted in chapters 1-10 of this title to the commission and shall have power to administer oaths and take depositions. The commission may conduct any number of such investigations contemporaneously through different agents, and may delegate to such agent or agents the taking of all testimony bearing upon any investigation or hearing. The decision of the commission shall be based upon its examination of all testimony and

records. The recommendations made by such agents shall be advisory only, and shall not preclude the taking of further testimony, if the commission so order, nor further investigation. (Mar. 4, 1913, 37 Stat. 982, ch. 150, § 8, par. 36.)

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§ 43-408. Commission may investigate unjust discriminatory rates, schedules, or services—No order to be entered without formal hearing.

Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates, tolls, charges, or schedules, or services, or time and conditions of payment, or any joint rate or rates, schedules, or services, are in any respect unreasonable or unjustly discriminatory, or that any time schedule, regulation, or act whatsoever affecting or relating to the conduct of any street railway or common carrier, or the production, transmission, delivery, or furnishing of heat, light, water, or power, or any service in connection therewith, or the conveyance of any telegraph or telephone message, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, or act complained of shall be entered by the commission without a formal hearing. (Mar. 4, 1913, 37 Stat. 983, ch. 150, § 8, par. 38.)

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§ 43-412. Expenses of investigations or revaluation to be borne by utility—Deposit for costs—Limitation of expenditures in rate and revaluation hearings.

The expenses of any investigation, valuation, revaluation, or proceeding of any nature by the Public Service Commission of or concerning any public utility operating

in the District of Columbia, and all expenses of any litigation, including appeals, arising from any such investigation, valuation, revaluation, or proceeding, or from any order or action of the said commission, shall be borne by the public utility investigated, valued, revalued, or otherwise affected as a special franchise tax in addition to all other taxes imposed by law, and such expenses with interest at 6 per centum per annum may be charged to operating expenses and amortized over such period as the Public Service Commission shall deem proper and be allowed for in the rates to be charged by such utility. When any such investigation, valuation, revaluation, or other proceeding is begun the said Public Service Commission may call upon the utility in question for the deposit of such reasonable sum or sums as in the opinion of said commission, it may deem necessary from time to time until the said proceeding or the litigation arising therefrom is completed, the money so paid to be deposited in the treasury of the United States to the credit of the appropriation account known as "miscellaneous trust fund deposit, District of Columbia" and to be disbursed in the manner provided for by law for other expenditures of the government of the District of Columbia, for such purposes as may be approved by the Public Service Commission. Any unexpended balance of such sum or sums so deposited shall be returned to the utility depositing the same: *Provided,* That the amount expended by the commission in any valuation or rate case shall not exceed one-half of 1 per centum of the existing valuation of the company investigated, and that the amount expended in all other investigations shall not exceed one-tenth of 1 per centum of the existing valuation for any one company for any one year. (Mar. 4, 1913, 37 Stat. 984, ch. 150, § 8, par. 42; Mar. 3, 1927, 44 Stat. 1351, ch. 304; Aug. 27, 1935, 49 Stat. 884, ch. 742, § 3; Aug. 30, 1964, 78 Stat. 634, Pub. L. 88-503, § 21.)

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§ 43-601. Public Service Commission—General powers.

The commission shall, within its jurisdiction—

Have general supervision of all gas corporations and electrical corporations having authority under any general or special law or under any charter or franchise to lay down, erect, or maintain wires, pipes, conduits, ducts, or other fixtures in, over, or under the streets, highways, and public places in the District of Columbia for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat, or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owned, leased, or operated by any corporation.

Investigate and ascertain, from time to time, the quality and quantity of gas supplied by persons or corporations; examine or investigate the methods employed by such persons and corporations in manufacturing, distributing, and supplying gas or electricity for light, heat, or power, and in transmitting the same, and have power to order such reasonable improvements as will reasonably promote the public interest, preserve the public health, and protect those using such gas or electricity and those employed in the manufacture and distribution thereof or in the manufacture and operation of the works, wires, poles, lines, conduits, ducts, and systems connected therewith, and have power to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts, and other reasonable devices, apparatus, and property of gas corporations and electrical corporations.

Have power by order to fix from time to time standards for determining the purity or the measurement of the illuminating power of gas to be manufactured, distributed, or sold by persons or corporations for lighting, heating, or power purposes, and to prescribe from time to time the efficiency of the electric supply system, of the current supplied, and of the lamps furnished by the persons or

corporations generating and selling electric current, and by order to require the gas so manufactured, distributed, or sold to equal the standards so fixed by it, and to prescribe from time to time the reasonable minimum and maximum pressure at which gas shall be delivered by said persons or corporations. For the purpose of determining whether the gas manufactured, distributed, or sold by such persons or corporations for lighting, heating, or power purposes conforms to the standards of illuminating power, purity, and pressure, and for the purpose of determining whether the efficiency of the electric supply system, of the current supplied, and of the lamps furnished conforms to the orders issued by the commission, the commission shall have power, of its own motion, to examine and investigate the plants and methods employed in manufacturing, delivering, and supplying gas or electricity, and shall have access, through its members or persons employed and authorized by it to make such examinations and investigations, to all parts of of the manufacturing plants owned, used or operated for the manufacture, transmission, or distribution of gas or electricity by any such person or corporation. Any employee or agent of the commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination, except in so far as he may be directed by the commission, or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $50 nor more than $500 for each offense. (Mar. 4, 1913, 37 Stat. 986, ch. 150, § 8, par. 55.)

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§ 43-704. Application to Court of Appeals for instructions—Application for reconsideration.

If at any time the commission shall be in doubt of the elements of value to be by them considered in arriving at the true valuation under the provisions of chapters 1-10 of this title, they are authorized and empowered to institute

a proceeding in equity in the District of Columbia Court of Appeals petitioning said court to instruct them as to the element or elements of value to be by them considered as aforesaid, and the particular utility under valuation at the time shall be made party defendant in said action.

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Any public utility or any other person or corporation affected by any final order or decision of the commission may, within thirty days after the publication thereof, file with the commission an application in writing requesting a reconsideration of the matters involved, and stating specifically the errors claimed as grounds for such reconsideration. No public utility or other person or corporation shall in any court urge or rely on any ground not so set forth in said application. The commission, within thirty days after the filing of such application, shall either grant or deny it. Failure by the commission to act upon such application within such period shall be deemed a denial thereof. If such application be granted, the commission, after giving notice thereof to all interested parties, shall, either with or without hearing, rescind, modify, or affirm its order or decision. The filing of such an application shall act as a stay upon the execution of the order or decision of the Commission until the final action of the Commission upon the application: *Provided*, That upon written consent of the utility such order or decision shall not be stayed unless otherwise ordered by the Commission. No appeal shall lie from any order of the Commission unless an application for reconsideration shall have been first made and determined. (Mar. 4, 1913, 37 Stat. 988, ch. 150, § 8, par. 64; Aug. 27, 1935, 49 Stat. 882, ch. 742, § 1; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127.)

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(As amended July 29, 1970, Pub. L. 91-358, title I, §168(a)(1), 84 Stat. 588.)

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§ 43-705. Appeal to Court of Appeals from certain orders—Precedence over other civil causes—Proceeding when additional evidence proper—Statement to accompany decision—Commission not liable for costs or damages.

The District of Columbia Court of Appeals shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. Any public utility or any other person or corporation affected by any final order or decision of the Commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may, within sixty days after final action by the Commission upon the petition for reconsideration, file with the clerk of the District of Columbia Court of Appeals a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the Commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon. *Provided,* That the parties, with the consent and approval of the Commission, may stipulate in writing that only certain portions of the record be transcribed and transmitted. Within this period the Commission or any other interested party shall answer, demur, or otherwise move or plead. Thereupon the appeal shall be at issue and ready for hearing. All such proceedings shall have precedence over any civil cause of a different nature pending in said court, and the District of Columbia Court of Appeals shall always be deemed open for the hearing thereof. Any such appeal shall be heard upon the record before the Commission, and no new or

additional evidence shall be received by the said court. The said court, or any judge or judges thereof, before whom any such appeal shall be heard, may require and direct the Commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the Commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the Commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the Commission and the conclusions of the Commission upon the said facts.

Upon the conclusion of its hearings of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the Commission or sustain the appeal and vacate the Commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action and in the case of the vacation of an order or decision of the Commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Said Commission shall not, nor shall any of its members, officers, agents, or employees, be taxed with any costs, nor shall they or any of them be required to give any supersedeas bond or security for costs or damages on any appeal whatsoever. Said Commission, or any of its members, officers, agents, or employees, shall not be liable to suit or action or for any judgment or decree for any damages, loss, or injury claimed by any public utility or person, nor required in any case to make any deposit for costs or pay for any service to the clerks of any court or to the marshal of the United States. (Mar. 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 65; Aug. 27, 1935, 49 Stat. 882, ch. 742, § 2; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 991, ch. 646, § 32(a), (b); May 24, 1949, 63 Stat. 100, ch. 139,

§ 127; July 29, 1970, Pub. L. 91-358, title I, §§ 163(i)(2), 168(a)(2), 84 Stat. 583, 588.)

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§ 43-1002. Commission to inquire into neglect or violation of law and have power to enforce all laws affecting utilities.

The commission shall inquire into any neglect or violation of the laws or regulations in force in the District of Columbia by any public utility doing business therein, or by the officers, agents, or employees thereof, or by any person operating the plant of any public utility, and shall have the power, and it shall be its duty, to enforce the provisions of chapters 1-10 of this title as well as all other laws relating to public utilities. (Mar. 4, 1913, 37 Stat. 993, ch. 150, § 8, par. 90.)

## APPENDIX F

Police Regulations—Article 47

Sec. 4. Unlawful Employment Practices. It shall be an unlawful employment practice to do any of the following acts because of the race, color, religion, national origin, or sex of any individual, or because of any reason that would not have been asserted but for the race, color, religion, national origin, or sex of any individual:

(a) By an employer—to fail or refuse to hire, or to discharge, any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, including promotion, or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.

(b) By an employment agency—to fail or refuse to refer for employment, or to classify or refer for employment, any individual, or otherwise to discriminate against any individual.

(c) By a labor organization—to exclude or to expel from its membership, or otherwise to discriminate against, any individual, or to limit, segregate, or classify its membership; or to classify or fail or refuse to refer for employment any individual in any way which would deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment.

(d) By an employer, employment agency, or labor organization—(i) to discriminate against any individual in admission to, or employment in, any program established to provide apprenticeship or other training or retraining, including on-the-job training program; (ii) to print or publish or cause to be printed or published any notice or adver-

tisement, or use any application form, relating to employment by such an employer, or to membership in or any classification or referral for employment by such a labor organization, or to any classification or referral for employment agency, indicating any preference, limitation, specification, or distinction, based on race, color, religion, national origin, or sex, except that such notice or advertisement may indicate a preference, limitation, specification, or distinction based on religion, national origin, or sex, when religion, national origin, or sex is a bona fide occupational qualification for the specific employment; (iii) to utilize any criterion or method of administration, directly or through contractual or other arrangement, which has the effect of discriminating against any individual in employment by any employer or membership in any labor organization; (iv) to violate or to fail to implement any consent agreement entered into with the Commissioners as part of the conciliation of any complaint filed under the authority of this Article.

(e) By any person—to cause or coerce, or attempt to cause or coerce, directly or indirectly, any person (i) to discriminate against an individual in violation of this Article because such individual or person has lawfully opposed any act or failure to act that is a violation of this Article or has, in good faith, filed a complaint, testified, participated or assisted in any way in any proceeding investigation under this Article, or (ii) to prevent any person from complying with this Article.

(f) As used in this Article, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the

Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Nothing contained in this Article shall be interpreted to require any employer, employment agency, labor organization or joint labor-management committee to grant preferential treatment to any individual or to any group because of the race, color, religion, national origin, or sex of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, national origin, or sex employed by any employer, referred or classified for employment by any employment agency or labor organization, or admitted to membership or classified in any labor organization, in comparison with the total number or percentage of persons of such race, color, religion, national origin, or sex in the District of Columbia, or in the available work force of the District of Columbia.

(h) It shall not be an unlawful employment practice for an employer to observe the provisions of any bona fide pension, retirement, welfare benefit plan or system not adopted as a subterfuge to evade the provisions of this regulation.

(i) It shall be an unlawful employment practice, punishable by a fine of not more than $50.00 for any person to require, at the expense of any employee or applicant for employment to whom such record may relate, as a condition of employment, the production of any arrest record or any copy, extract or statement thereof. (C.O. 68-222, 3-11-68)

## APPENDIX G

Filed Feb. 23, 1971

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2382-70

Civil Action No. 2384-70

POTOMAC ELECTRIC POWER COMPANY, *Plaintiff,*

ELECTRIC UTILITY EMPLOYEES' UNION, *Interested Party,*

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, *Defendant.*

### Order

These appeals from Section 4 of Order No. 5429, which was entered and published on April 15, 1970, by the Public Service Commission of the District of Columbia (the "Commission") in its Formal Case No. 541 (said Section 4 being hereafter sometimes called the "Order"), came before the Court for hearing and decision on January 12, 1971.

Although argument at that hearing was limited to procedural issues, the Court carefully examined and considered the pleadings, memoranda and briefs filed on the merits by all parties and by amicus curiae. Because Pepco is a private utility, pursuing an essentially governmental function, guaranteed a stated rate of return on its investment and regulated in the public interest, the Court concludes that the Commission had authority and power to examine Pepco's employment practices, either as part of a rate proceeding or as an independent matter. We express no opinion, however, as to the merits of the particular plan proposed in this case because it appears that the Petitions of Appeal filed by the company and by the

union should be sustained on procedural grounds, and that Section 4 of Order 5429 should be set aside and vacated. In accordance with the requirements of the District of Columbia Code § 43-705, the Court hereby enters the following:

STATEMENT OF REASONS

1. In any contested case, the Commission is required by D. C. Code § 1-1509(a), by D. C. Code Title 43 (including § 43-303), and by the constitutional requirements of due process of law to give all parties notice of the issues involved in the case. Pepco was not given adequate formal notice by the Commission that the subject of the Order, Pepco's employment practices, was an independent issue to be considered by the Commission in its Formal Case No. 541, which was a rate proceeding. Further, in determining the issues to which it should address itself, Pepco properly relied on the statement by the Chairman of the Commission during the proceedings to the effect that there would be no basis for an order regarding Pepco's employment practices unless the subject of employment practices was connected up to the cost of service, a connection which was never made, as stated by the Commission in the opinion accompanying the Order

Because the employment discrimination issue was not delineated in any public notice issued by the Commission, the EUEU, whose substantial interests were affected by the Order, had no notice that Pepco's employment practices were an independent issue in the proceeding.

Neither Pepco nor the EUEU had a meaningful opportunity to be heard and to present evidence with respect to that issue. Such an opportunity is required by D. C. Code § 1-1509(b) and Title 43 (including § 43-303), and by due process of law.

As a result of the Commission's failure to give Pepco and the EUEU the required notice that the subject of the

Order was to be an independent issue in the proceeding, and because, therefore, neither of these parties had a meaningful opportunity to be heard on the issue, the Order is void and must be set aside and vacated.

2. Neither Pepco nor the EUEU was given notice by the Commission as to the contents of the Affirmative Action Plan set forth in Appendix A to the Order prior to its promulgation, and consequently neither Pepco nor the EUEU was given an opportunity to be heard with respect to its provisions. As set forth above, notice and opportunity to cross-examine and to present evidence were required to be given by the Commission under the applicable D. C. statutes and in accordance with the constitutional requirements of due process of law.

The Commission's statement that Pepco could seek a hearing on the Plan after its promulgation does not satisfy the requirements of the D. C. statutes or the Constitution.

Because the Commission did not give the required notice and did not provide an opportunity to cross-examine or present evidence with respect to the Plan, the Order with its Appendix A is void and must be set aside and vacated.

3. The Commission failed to accompany the Order with findings of fact and conclusions of law. Such findings and conclusions are required by D. C. Code § 1-1509(e) and by D. C. Code § 43-705. Specifically, the Commission failed to make required findings of fact and conclusions of law regarding Pepco's employment practices in support of the Order.

Because the Commission failed to make the required findings of fact and conclusions of law, the Order is void and must be set aside and vacated.

4. The Order was not supported by substantial evidence of record as required by D. C. Code § 1-1509(e) and the constitutional requirement of due process of law. The evi-

dence of record allegedly dealing with Pepco's employment practices consisted of an Equal Employment Opportunity Employer Information Report, Form EEO-1, giving data as of December 31, 1968, and the sworn testimony of three Urban League witnesses. A review of this evidence establishes that the Order was based on wholly inadequate and insubstantial evidence with respect to Pepco's employment practices.

Because it was not supported by substantial evidence, the Order is void and must be set aside and vacated.

## ORDER

Upon consideration of the foregoing and for the reasons set forth above, it is this 23rd day of February, 1971,

ORDERED that the Petitions of Appeal of Potomac Electric Power Company and the Electric Utility Employees' Union be, and the same hereby are, sustained; and it is further

ORDERED that Section 4 of Order No. 5429, which was entered and published on April 15, 1970, by the Public Service Commission of the District of Columbia in its Formal Case No. 541, be, and the same hereby is, set aside and vacated.

/s/ JOHN H. PRATT
John H. Pratt
*United States District Judge*